IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

PETER H. WENDELL AND WILLIAM H. BOSS (SURVIVORS OF WILLIAM I. BOSS, DECEASED), CHARLES H. BOSS, HENRY BOSS AND EDWARD F. LANSING, AND H. KIRK PORTER, EXECUTOR, AND TRUSTEE UNDER THE WILL OF ELIZA BOSS, DECEASED, THE LAST NAMED BEING OF BOSS CREEK FARM, APPELLANTS,

v.

AVARILLA ARCHERD AND MARIETTA CLUTE, CHILDREN AND ONLY HEIRS AT LAW OF JOHN VAN BUSKIRK, DECEASED, SURVIVORS.

No. 166.

MOTION OF ASSISTANT FOR APPELLEE FOR LEAVE TO FILE BRIEF.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN M. WILSON AND WILLIAM M. Black (successors to William P. Craighill, Charles F. Powell), Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, constituting and composing the commission to select the land for Rock Creek Park, appellants,
v.
AVARILLA LAMBERT AND MARTHA Carr, children and sole heirs at law of John Van Riswick, deceased, survivors.

No. 159.

STATEMENT.

The case comes into this court by appeal from a judgment of the court of appeals of the District of Columbia, affirming a decree of the supreme court of the District, granting an injunction against appellants, the Rock Creek Park Commission, to restrain them from levying an assessment on lands of the appellees, adjoining the Rock Creek Park, on account of benefits accruing by reason of the establishment of the park.

Under the provisions of the act of September 27, 1890, authorizing the establishment of a public park in the District of Columbia (26 Stats., 492), the appellants were appointed a commission to select land for the Rock Creek Park. For convenience of reference the act is printed as an appendix to this brief.

The act authorized the commission to select the land for the park, to prepare and record an accurate map of the park, and to take the necessary steps, by purchase or condemnation, to acquire the land selected. An appropriation of $1,200,000, or so much thereof as might be necessary, was made to pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses incident to the establishment of the park (sec. 6).

The commission took the proper steps under the act to locate and establish the park and to acquire the land included within its boundaries. The objections to their proceedings in the condemnation of the land for the park were finally disposed of by the decision of this court in *Shoemaker* v. *United States* (147 U. S., 282), and thereafter the appropriated fund deposited in court as compensation for land condemned was paid out to the respective owners upon reports of a special auditor.

After the decision in the Shoemaker Case the park commission having ascertained the cost of the land, including expenses, were about to proceed under section 6 of the act to assess the same upon the lots, lands, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of the park

in proportion to the benefit resulting to such real estate, when they were met with a bill for an injunction filed by the appellees in the supreme court of the District to restrain them from making the assessment required by this section of the act. (Rec., p. 2.) To this bill a demurrer was interposed, which was sustained (Rec., p. 18), with leave to renew the application at a later stage in the proceedings of the commission. Subsequently a supplemental bill was filed (Rec., p. 19) renewing the averments of the original bill and setting forth certain steps taken by the commission toward making an assessment upon the lands of the appellees.

The salient objections to the proposed assessment for benefits were these:

1. The land had already been taken and paid for out of the Government appropriation, and no assessment was required for any further payment.

2. The powers and duties of the commission were at an end.

3. No special benefits had accrued to the land in question, inasmuch as there had been no improvement of the proposed park and no change whatever from previous condition.

4. Section 6, authorizing the assessment for benefits, is conflicting, meaningless, and unintelligible in its provisions, and therefore incapable of execution.

5. The principle of assessment for supposed benefits under such circumstances is essentially vicious, and the provisions of section 6, authorizing such assessment, are repugnant to the Constitution of the United States.

The court granted an injunction *pendente lite* (Rec., p. 25), upon the ground set forth in the opinion of Cox, J. (Rec., p. 26). The appellants then answered as to part and demurred to the residue of the original and supplemental bills (Rec., p. 33). The cause was heard on the bills and answer and the demurrer, and the court rendered a decree making the injunction perpetual, for the reasons stated in the opinion delivered on the application for the injunction *pendente lite*. From this decree an appeal was taken to the court of appeals of the District, and the judgment of the supreme court of the District was affirmed by a divided court, Morris, J., delivering the opinion of the court (Rec., p. 40) and Alvey, C. J., dissenting (Rec., p. 55). From this judgment of affirmance an appeal is taken to this court.

The principal questions involved in the appeal are:

First. Whether Congress has power to impose taxes upon land in the District of Columbia by way of assessment for special benefits accruing to such lands by reason of the expenditures of public funds for works of public utility.

Second. Whether, if such power exists, the act of September 27, 1890, providing for the acquisition of land for the Rock Creek Park and the levy of assessments upon other lands specially benefited by its establishment, is a valid exercise of the power. (Opin. Morris, J., Rec., top p. 50).

ARGUMENT.

I.

All the questions raised in this case can be solved by an application of the principles settled in the cases of *Shoemaker* v. *The United States* (147 U. S., 282) and *Bauman* v. *Ross* (167 U. S., 548).

In the Shoemaker Case the validity of the Rock Creek Park act was sustained, and the proceedings of the commission in selecting the land, making and filing the map, and condemning the real estate it was unable to purchase was passed upon and upheld by this court. It is true that at the time the Shoemaker Case arose no attempt had been made by the commission to make an assessment for special benefits, but the provisions of the entire act were before the court in the consideration of its constitutionality as a whole. It is difficult to understand how the court could have sustained the validity of the law without approving of the provisions for assessment, which are really an essential part of the scheme, incapable of rejection without impairing the integrity of the law. Certainly the court carefully considered the terms of section six (6), regulating the assessment for benefits and providing a method for paying the costs and expenses of establishing the park. In the statement of the case, prepared by Mr. Justice Shiras, who delivered the opinion of the court, there is the following statement of the provisions of section 6 (p. 286):

> It was made the further duty of the commission, when they had ascertained the amount required to be paid for the land and for expenses, to assess the

same upon the lands, lots, and blocks situated in said District specially benefited by reason of the location and improvement of said park, in proportion to such benefits to said property; and it was provided that if the commission should find that the benefits were not equal to the cost and expenses of the land obtained for the park, they should assess each tract specially benefited to the extent of the benefit thereto. If the proceeds of the assessment exceeded the cost of the park, the excess was to be used in its improvement if such excess should not exceed the amount of ten thousand dollars; any part above tha amount to be refunded ratably. The commission was to give due notice of the time and place of their meeting for the purpose of making such assessment for benefits, and all persons interested might appear and be heard. The assessment being duly made, it became the duty of the commission to apply to the supreme court of the District of Columbia to have it confirmed. The court was given power, after notice duly given to all parties in interest, to hear and determine all matters connected with said assessment, and to revise, correct, amend, and confirm the same, in whole or in part, or order a new assessment, in whole or in part, with or without further notice, or on such notice as it should prescribe. The act also prescribed the mode in which payment of the assessment for benefits should be made after it was confirmed, and provided for the enforcement of such payment in the manner employed in the District for the collection of delinquent taxes. All payments under said assessment were to be made to the Treasurer of the United States, and all money so collected might be paid by the Treasurer, on the order of the commission, to any persons entitled thereto, as compensation for land or services.

> To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other expenses incidental thereto, the sum of $1,200,000 was appropriated, out of any money in the Treasury not otherwise appropriated, one-half of which, as well as one-half of any sum annually appropriated and expended for the maintenance and improvement of the park, was made a charge upon the revenues of the District of Columbia.

In the opinion of the court, the following language is used, showing that the court considered and sustained the constitutionality of the provisions for an assessment for benefits set forth in this section (bottom p. 302):

> A further objection is made to the validity of the act by reason of the sixth section, which provides for the assessment of benefits resulting from the "location and improvement of said park" upon lands so especially benefited.
>
> The cases heretofore cited to show that the erection of parks in cities is a public use in a constitutional sense, were, most of them, cases in which it was likewise held that it is competent for the legislature, in providing for the cost of such parks, to assess a proportionate part of the cost upon property specially benefited, and we need not repeat the citations.
>
> No special request on the subject of the legal effect of the provisions in respect to special benefits seems to have been made to the court below, and there is no specific assignment of error as to it. Nor does it appear that any person having property actually assessed for special benefits is a party as plaintiff in error. We are therefore relieved from any extended consideration of this feature of the act.

In the subsequent case of *Bauman* v. *Ross*, ably argued and carefully considered, this court, in an elaborate opinion delivered by Mr. Justice Gray, goes into an extended discussion of the authority of Congress to authorize an assessment for benefits on property in the District of Columbia especially benefited by improvements made under what is commonly known as The Highway Extension Act. Every objection urged against the validity of section 6 of the Rock Creek Park Act was presented to the court, considered, and overruled in the case of *Bauman* v. *Ross*. Discussing the validity of the rule of assessment prescribed in The Highway Extension Act, Mr. Justice Gray, speaking for the court, says (167 U. S. bottom p. 591):

> Nor can we entertain any serious doubt as to the rule of assessment which is to govern. The directions that the jury "shall ascertain and determine what property is benefited" by the establishment of the highway and "shall assess against each parcel which it shall find to be so benefited its proper proportional part of" the whole sum directed to be assessed, making due allowance, when part only of a tract has been taken, for any deduction already made in the assessment of damages for such taking, "on account of the benefit to the remainder of the tract," reasonably, if not necessarily, imply that the assessment is to be proportional to the benefit and not to the market value or any other test, and are equivalent to the words in the Rock Creek Park Act directing lands in the District of Columbia to be assessed, "as nearly as may be, in proportion to the benefits resulting to such real

estate." (Act of September 27, 1890, chap. 1001, sec. 6; 26 Stat., 493; *Shoemaker* v. *United States*, above cited.)

It thus appears that this court did consider and sustain the validity of the provisions of section 6 respecting an assessment for benefits in the Shoemaker Case, and in deciding the Bauman Case had in mind the similarity of the provisions in the Highway Extension Act to those in the Rock Creek Park Act.

I shall now proceed to apply the principles laid down in the Shoemaker Case and in the Bauman Case to the provisions of section 6 of the Rock Creek Park Act, to which objections are made in the case before the court.

II.

The establishment of a park in the District of Columbia is a public purpose, for which Congress may authorize land to be purchased and appropriated and the cost thereof assessed upon property especially benefited: *Shoemaker* v. *United States*, 147 U. S., bottom p. 297, bottom p. 302, citing *Brooklyn Park Commissioners* v. *Armstrong*, 45 N. Y., 234; *In re Commissioners of the Central Park*, 63 Barb., 282; *Owners of Ground* v. *Mayor of Albany*, 15 Wend., 374; *Holt* v. *Somerville*, 127 Mass., 408; *Foster* v. *Boston Park Commissioners*, 131 Mass., 225; also 133 Mass., 321; *St. Louis County Court* v. *Griswold*, 58 Mo., 175; *Cook* v. *South Park Commissioners*, 61 Ill., 115; *Kerr* v. *South Park Commissioners*, 117 U. S., 379.

III.

It is contended by the appellees that the Rock Creek Park is not an improvement of local character, but is intended for the benefit and enjoyment of the people of the United States, and that the cost of it should be borne by the people of the United States and not be imposed upon the people of the District of Columbia or upon the owners of adjacent lands alleged to be especially benefited by the establishment of the park.

> But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole State or by the district of neighborhood immediately benefited. The case, in this respect, comes within the principle upon which this court held that the legislature of Alabama might charge the county of Mobile with the whole cost of an extensive improvement of Mobile Harbor, and, speaking by Mr. Justice Field, said: "the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure." *Mobile County* v. *Kimball*, 102 U. S., 691, 703, 704.

The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, widening, the grading, or the repair of a street to be assessed upon the owners of lands benefited thereby. *Davidson* v. *New Orleans*, 96 U. S., 97; *Hagar* v. *Reclamation District*, 111 U. S., 701; *Spencer* v. *Merchant*, 125 U. S., 345, 355, 356; *Walston* v. *Nevin*, 128 U. S., 578, 582; *Lent* v. *Tillson*, 140 U. S., 316, 328; *Illinois Central Railroad* v. *Decatur*, 147 U. S., 190, 198, 199; *Paulsen* v. *Portland*, 149 U. S., 30. This authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court. *Willard* v. *Presbury*, 14 Wall., 676; *Mattingly* v. *District of Columbia*, 97 U. S., 687; *Shoemaker* v. *United States*, 147 U. S., 282, 286, 302.

The class of lands to be assessed for the purpose may be either determined by the legislature itself by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. *Spencer* v. *Merchant* and *Shoemaker* v. *United States*, above cited; *Fallbrook District* v. *Bradley*, 164 U. S., 112, 167, 168, 175, 176; *Uhlan* v. *Baltimore*, 165 U. S., 719. See also the very able opinion of the court of appeals of New York, delivered by Judge Ruggles, in *People* v. *Brooklyn*, 4 N. Y., 419, 430. (Justice Shiras's Opin., *Bauman* v. *Ross*, 167 U. S., 589.)

It is objected that the measure of the proposed assessment is not fixed by the law nor determinable by the commission, and for this reason the assessment feature of

the act is incapable of execution. In support of this contention the following language from the opinion of Cox, J. (Rec., bottom p. 28) is relied upon:

> If the court were asked to direct the commissioners by mandamus to discharge the duty devolved upon them by this clause, what direction could the court give? What proportion could it direct the commission to assess upon the property? It seems evident that the clause is too uncertain to be executed either voluntarily by the commission or under compulsion from the court, and they must be held to derive no authority to act under that clause.

The clause, or rather clauses, directing the assessment and defining the sum to be assessed, read as follows (beginning sec. 6):

> The commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate. If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, they shall assess each tract or parcel of land specially benefited to the extent of such benefits as they shall determine the said real estate specially benefited.

In the Shoemaker Case, the meaning and effect of this language is thus stated by this court (p. 286):

> It was made the further duty of the commission, when they had ascertained the amount required to

be paid for the land and for expenses, to assess the same upon the lands, lots, and blocks situated in said District specially benefited by reason of the location and improvement of said park, in proportion to such benefits to said property; and it was provided that if the commission should find that the benefits were not equal to the cost and expenses of the land obtained for the park, they should assess each tract specially benefited to the extent of the benefit thereto.

There is no uncertainty about the intent and meaning of the clauses quoted. If the lands to be assessed have been benefited to the full extent of the ascertained cost and expenses, then the measure of the assessment is the amount of such ascertained cost and expenses; if the real estate to be assessed has not been benefited to the full extent of such ascertained cost and expenses, then the measure of the assessment is the proportion of the ascertained cost and expenses to which the real estate has been specially benefited. A court would have no difficulty in requiring the commission by writ of mandamus to perform the duties imposed upon it by these clauses. The commission would be directed to ascertain the cost of the land for the park, including expenses; to determine next the amount to which the lands specially benefited by the establishment of the park had been benefited, and then to assess this amount upon such lands in the proportion in which they had been benefited by the establishment of the park. If the benefits resulting to the real estate to be assessed should not equal the cost of the park, then only a proportion of this cost

would be assessed, and this proportion would be assessed upon the lands specially benefited as nearly as might be in proportion to the benefits resulting. The unskillful use of a few words can not be used to defeat this provision for assessment. The words "such proportion of" following the words "shall assess" in the first clause can be rejected as surplusage, in view of the provisions of the second clause. The draftsman evidently had in mind, when framing the first clause, that the benefits might not equal the cost of the park, and, therefore, included these words, neglecting, afterwards, when a special provision was made for the assessment of only a proportion of the cost of the park to strike them out. The word "estimated" before "cost and expenses" in the second clause should be read "ascertained." The words are used as equivalents.

IV.

It is objected that the class of lands to be assessed is not defined, or rather that there are conflicting provisions upon this point. The first clause which has been quoted requires the assessment to be made upon lands "specially benefited by reason of the location and improvement of said park;" the second clause requires the assessment to be made upon lands "directly benefited by reason of the location of the park." The following language of Cox, J., is relied upon as presenting in forcible terms this objection (Rec., p. 29):

> There is a further difference to be noted between the two clauses. The assessment under the first clause was to be made with reference to the benefits

resulting from both the *location and improvement*. In the second clause, each tract is to be assessed to the extent of the benefits derived only from the *location* of the park. *At the present time* it is quite plain that no benefits are derived *from the location*, because the adjacent owners of property *have nothing which they had not before*. For this reason, it appears that the commission have declared their intention of assessing with reference to both location and improvement. Their whole authority is derived under this second clause; and that does not authorize them to assess with reference to both *location and improvement*, and so far their proposed assessment is therefore without authority of law.

But if it could be held to authorize such proposed assessment, the standard by which they are to be guided is so uncertain as to make the execution of the law as impossible under this as under the former clause. When a street is by municipal ordinance directed to be opened, graded, paved, or otherwise improved, we all know exactly what is to be done and what the effect will be upon the adjacent property; but there is no law providing for the improvement of the park. No system of improvement has been adopted, no money has been appropriated for the purpose of making improvements, and no one knows that any ever will be appropriated. The only standard which the commissioners would have for estimating benefits with reference to improvements would be found in their imagination as to what may be done at some indefinite time in the future. It is impossible that a just appraisement of benefits could be made on that basis. Here also, if the court were to attempt to enforce the duty charged upon the commissioners, it would find it equally impossible with such proceedings under the first clause, as already suggested.

This objection proceeds upon the assumption that the Rock Creek Park is akin to a public library or an art gallery, erected for the public enjoyment and benefit. There is a distinction to be observed between the Rock Creek Park and a public improvement of a purely artificial character. The Rock Creek Park is a natural park. Such a park is erected, not to change but to preserve the natural condition of the country which it incloses. The ground, the rocks, the streams, the grass, the shrubbery, the trees, all these, as they are, are to be preserved, for they make up the natural beauty of the park. The Rock Creek Park was improved, in a natural and proper sense, when the land composing it was set apart in compact form and dedicated perpetually to the benefit and enjoyment of the public. The segregation of this tract of land, the provisions for preserving its natural condition and beauties, amounted to an improvement of it as a park. No further improvement is necessary, except the construction of certain driveways, bridle paths, and footways to make it more accessible. This is provided for in the seventh section of the act, which imposes upon the Commissioners of the District and Chief of Engineers of the United States Army the duty, after the park has been established, of laying out and preparing roadways and bridle paths to be used for driving and for horseback riding, respectively, and footways for pedestrians.

The benefits resulting to adjacent property by the establishment of the park are benefits resulting from its location and improvement in the sense indicated. The

proximity of "a bit of country" never to be built on, whose natural beauties are to be forever preserved, inevitably adds great value to the real estate in the neighborhood of the Rock Creek Park. Before this park was established a person owning a piece of residence property near it could not tell who would purchase the land now in the park, nor to what use it might be applied. Undesirable neighbors and offensive uses were possible. This possibility affected the value of the land. But with the establishment of the park conditions changed. Where the park is, no undesirable persons can reside; no structures impairing the value of adjacent property can be erected; no occupations or industries of an offensive character can be instituted. All the commission had to consider was the benefits resulting from the establishment of the park, from its location and improvement in that sense. These benefits were present, possible of ascertainment at the time, and it was the duty of the commission to ascertain them and assess the benefited property to that extent.

The commission was not permitted to proceed with the assessment, and there is no complaint before the court based upon what the commission actually did. The commission was stopped by an injunction at the inception of its work of assessment. If the commission, in the exercise of its functions under the law, should adopt an erroneous rule of assessment, and in ascertaining benefits should take into account matters of a purely speculative character, such erroneous action might be reviewed and corrected by a court. It will be time enough

to object to the consideration of purely speculative benefits, benefits only found in the imagination of the commission, when a proper case is presented to the court.

The ascertainment of the lands which are benefited by the location and improvement of the park is left to the commission.

> The question what parcels of lands within the district so ascertained are benefited, and therefore liable to be assessed, might justly and constitutionally, as appears by the cases above cited, be committed by Congress to the determination of the tribunal intrusted with the authority of making this assessment. (Mr. Justice Shiras in *Baumann* v. *Ross*, 167 U. S., bottom p. 591.)

V.

The sum directed by section six to be assessed is readily ascertainable, the class of lands to be assessed is sufficiently defined, the rule of assessment to be followed is easy of comprehension, and expressly approved by this court in *Baumann* v. *Ross*, 167 U. S., top page 592. It remains to consider the objection that the park has been paid for out of the Congressional appropriation, and therefore no assessment can be made; and that if an assessment can be made, it will result probably in not only paying back what the Government has expended, but in covering into the Treasury a considerable additional amount.

This objection is open to the observation that it will be time enough to cross this stream when we come to it. There is no occasion to worry about an excess of money

being paid into the United States Treasury at present. If an unexpected sum should be realized from the assessment, there would be no difficulty in handling and disposing of it in a proper and equitable manner.

But there is no possibility of that happening which counsel and the court below affect to fear. There is no gold mine for the Government in this park scheme. Provision is made for the assessment of the cost of the park on real estate in the District, if there be real estate specially benefited to the extent of such cost. If the benefits do not amount to so much, a proportion of the cost of the park is to be assessed. Time will be necessarily consumed in making and collecting the assessment, but the owners of land purchased or appropriated must be paid at once, so an appropriation of $1,200,000, "or so much thereof as may be necessary," was made "to pay the expenses of inquiry, survey, assessment, cost of land taken, and all other necessary expenses incidental thereto." One-half of this sum, "so much thereof as may be expended," is to be reimbursed to the Treasury of the United States out of the revenue of the District of Columbia. The effect of these various provisions is, that the Government appropriation is evidently used to anticipate the collection of the assessment, and after deducting the assessment when collected from the portion of the appropriation expended, one-half of the balance is to be reimbursed to the Government out of the revenues of the District of Columbia. In other words, if the entire appropriation of $1,200,000 has been paid out for the park and $600,000 is realized from the assessment, this

amount is to be paid into the Treasury, and operates as a virtual repayment to that extent of the expended appropriation. Of the balance of the appropriation, amounting in the supposed case to $600,000, the District will have to pay one-half, or $300,000, reimbursing the Government to that extent. If an erroneous distribution of money as between the Government, the District, and the owners of assessed property should be made, it can be corrected at the proper time.

VI.

The provisions in section 6 for a notice and hearing in the matter of the assessment, first, by the commission when making the assessment, and, second, by the court in confirming the same, constitutes due process of law. (*Bauman* v. *Ross*, 167 U. S., 548, middle page 590, citing *Davidson* v. *New Orleans*, *Spencer* v. *Merchant*, *Walston* v. *Nevin*, *Lent* v. *Tillson*, *Paulsen* v. *Portland*, and *Fallbrook District* v. *Bradley*.)

VII.

When one is satisfied that a statute is vicious in principle and repugnant to the fundamental law, it is not difficult to reach the conclusion that its provisions are impossible of execution. One is apt to lose sight of those salutary rules, so often referred to by this court in sustaining and enforcing the enactments of Congress.

> "Every possible presumption," said Mr. Chief Justice Waite, speaking for the court in *The Sinking Fund Cases*, 99 U. S., 700, 718, "is in favor of the

> validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Following this rule is the familiar one, that in determining the construction of a law, the court will give that meaning to its language which will sustain instead of defeat its validity, and give effective operation to its provisions, the rule well expressed by Alvey, C. J., in language quoted by this court with approval in *Benanon v. Ross*, 167 U. S., middle p. 596.

> Every reasonable intendment should be indulged in order to maintain the act in its entirety, and if there be any reasonable mode of construction by which the entire act, and every provision thereof, may be sustained, as against a mere plausible construction tending to a contrary result, the former mode of construction must prevail. It is only when no other reasonable construction can be supported that an act of Congress, or any part of it, can be declared to be unconstitutional and void, or invalid for any cause.

An error or mistake in phraseology, manifest upon the face of the statute when read as a whole, may be disregarded or corrected by a court in order to effectuate the evident intention of the legislature.

> When it thus appears beyond doubt that a statute, when read literally as printed, is impossible of execution, or will defeat the plain object of its enactment, or is senseless, or leads to absurd results or consequences, a court is authorized to regard such

> defect as the result of error or mistake, and to put such construction upon the statute as will correct the error or mistake, by carrying out the clear purpose and manifest intention of the legislature. The error or mistake, as well as the proper correction, must appear beyond doubt from the face of the act, or when read in connection with other acts in *pari materia*. (Burket, Judge, in *State ex rel.* v. *Archibald*, 52 O. S. 1, 9, citing many cases.)

In *Lent* v. *Tillson*, 140 U. S., 316,329, this court quotes with approval the following language of the supreme court of California:

> To give the statute the construction contended for would not only defeat the evident purpose, but would make the whole proceeding farcical. And I must confess, it seems to me it requires great industry in going wrong, in view of all the circumstances, to conclude that such can be the meaning. Inapt words certainly are found in the section (sec. 8), but it would not have provided so elaborately for a thorough investigation for grievances if it were not intended that redress should be awarded. The statute has apparently been patched and tinkered after it was first drawn, and incongruous matter injected into the body of it. But it still provides for a full hearing, and that the court may alter and modify.

If it be necessary to effectuate the evident intention of Congress in enacting section six of the Rock Creek Park Act, to reject certain inapt words, inserted by mistake, as for example, the words "such proportion of" following the words "shall assess" in the first clause of the section, and to correct other words used by inadvertence, as

for instance, to change "eight" to "seven" where the section provides, "if the proceeds of assessment exceed the cost of the park the excess shall be used in this improvement, under the direction of the officers named in section *eight*," there being no *section eight* in the act and *section seven* being the one which provides for the permanent board to take charge of the improvement of the park in the construction of roads, bridle paths, and footways, there is ample authority for such action.

It is submitted that the judgments below should be reversed, with instructions to dismiss the bill.

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 4, 1897.

APPENDIX.

AN ACT authorizing the establishment of a public park in the District of Columbia.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a tract of land lying on both sides of Rock Creek, beginning at Klingle Ford Bridge, and running northwardly, following the course of said creek, of a width not less at any point than six hundred feet, nor more than twelve hundred feet, including the bed of the creek, of which not less than two hundred feet shall be on either side of said creek, south of Broad Branch road and Blagden Mill road and of such greater width north of said roads as the commissioners designated in this act may select, shall be secured, as hereinafter set out, and be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known by the name of Rock Creek Park: *Provided, however*, That the whole tract so to be selected and condemned under the provisions of this act shall not exceed two thousand acres nor the total cost thereof exceed the amount of money herein appropriated.

SEC. 2. That the Chief of Engineers of the United States Army, the Engineer Commissioner of the District of Columbia, and three citizens to be appointed by the President, by and with the advice and consent of the Senate, be, and they are hereby, created a commission to

select the land for said park, of the quantity and within the limits aforesaid, and to have the same surveyed by the assistant to the said Engineer Commissioner of the District of Columbia in charge of public highways, which said assistant shall also act as executive officer to the said commission.

SEC. 3. That the said commission shall cause to be made an accurate map of said Rock Creek Park, showing the location, quantity, and character of each parcel of private property to be taken for such purpose, with the names of the respective owners inscribed thereon, which map shall be filed and recorded in the public records of the District of Columbia, and from and after the date of filing said map the several tracts and parcels of land embraced in said Rock Creek Park shall be held as condemned for public uses, and the title thereof vested in the United States, subject to the payment of just compensation, to be determined by said commission, and approved by the President of the United States: *Provided*, That such compensation be accepted by the owner or owners of the several parcels of land.

That if the said commission shall be unable by agreement with the respective owners to purchase all the land so selected and condemned within thirty days after such condemnation, at the price approved by the President of the United States, it shall, at the expiration of such period of thirty days, make application to the supreme court of the District of Columbia, by petition, at a general or special term, for an assessment of the value of such land as it has been unable to purchase.

Said petition shall contain a particular description of the property selected and condemned, with the name of the owner or owners thereof, if known, and their residences, as far as the same may be ascertained, together with a copy of the recorded map of the park; and the said court is hereby authorized and required, upon such

application, without delay, to notify the owners and occupants of the land, if known, by personal service, and if unknown, by service by publication, and to ascertain and assess the value of the land so selected and condemned, by appointing three competent and disinterested commissioners to appraise the value or values thereof, and to return the appraisement to the court; and when the value or values of such lands are thus ascertained, and the President of the United States shall decide the same to be reasonable, said value or values shall be paid to the owner or owners, and the United States shall be deemed to have a valid title to said land; and if in any case the owner or owners of any portion of said land shall refuse or neglect, after the appraisement of the cash value of said lands and improvements, to demand or receive the same from said court, upon depositing the appraised value in said court to the credit of such owner or owners, respectively, the fee-simple shall in like manner be vested in the United States.

SEC. 4. That said court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order or issue any process for giving possession.

SEC. 5. That no delay in making an assessment of compensation, or in taking possession, shall be occasioned by any doubt which may arise as to the ownership of the property, or any part thereof, or as to the interests of the respective owners. In such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. In all cases as soon as the said commission shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken. All proceedings hereunder shall be in the name of the United States of America and managed by the Commission.

SEC. 6. That the commission having ascertained the cost of the land, including expenses, shall assess such proportion of such cost and expenses upon the lands, lots, and blocks situated in the District of Columbia, specially benefited by reason of the location and improvement of said park, as nearly as may be, in proportion to the benefits resulting to such real estate.

If said commission shall find that the real estate in said District directly benefited by reason of the location of the park is not benefited to the full extent of the estimated cost and expenses, then they shall assess each tract or parcel of land specially benefited to the extent of such benefits as they shall deem the said real estate specially benefited. The commission shall give at least ten days' notice, in one daily newspaper published in the city of Washington, of the time and place of their meeting for the purpose of making such assessment and may adjourn from time to time till the same be completed. In making the assessment the real estate benefited shall be assessed by the description as appears of record in the District on the day of the first meeting; but no error in description shall vitiate the assessment: *Provided*, That the premises are described with substantial accuracy. The commission shall estimate the value of the different parcels of real estate benefited as aforesaid and the amount assessed against each tract or parcel, and enter all in an assessment book. All persons interested may appear and be heard. When the assessment shall be completed it shall be signed by the commission, or a majority (which majority shall have power always to act), and be filed in the office of the clerk of the supreme court of the District of Columbia. The commission shall apply to the court for a confirmation of said assessment, giving at least ten days' notice of the time thereof by publication in one daily newspaper published in the city of Washington, which notice shall state in general terms the subject and the object of the application.

The said court shall have power, after said notice shall have been duly given, to hear and determine all matters connected with said assessment; and may revise, correct, amend, and conform said assessment, in whole or in part, or order a new assessment, in whole or in part, with or without further notice or on such notice as it shall prescribe; but no order for a new assessment in part, or any partial adverse action, shall hinder or delay confirmation of the residue, or collection of the assessment thereon. Confirmation of any part of the assessment shall make the same a lien on the real estate.

The assessment, when confirmed, shall be divided into four equal installments, and may be paid by any party interested in full or in one, two, three, and four years, on or before which times all shall be payable, with six per centum annual interest on all deferred payments. All payments shall be made to the Treasurer of the United States, who shall keep the account as a separate fund. The orders of the court shall be conclusive evidence of the regularity of all previous proceedings necessary to the validity thereof, and of all matters recited in said orders. The clerk of said court shall keep a record of all proceedings in regard to said assessment and confirmation. The commission shall furnish the said clerk with a duplicate of its assessment book, and in both shall be entered any change made or ordered by the court as to any real estate. Such book filed with the clerk when completed and certified shall be prima facie evidence of all facts recited therein. In case assessments are not paid as aforesaid the book of assessments certified by the clerk of the court shall be delivered to the officer charged by law with the duty of collecting delinquent taxes in the District of Columbia, who shall proceed to collect the same as delinquent real estate taxes are collected. No sale for any installment of assessment shall discharge the real estate from any subsequent installment; and proceedings for

subsequent installments shall be as if no default had been made in prior ones.

All money so collected may be paid by the Treasurer on the order of the commission to any persons entitled thereto as compensation for land or services. Such order on the Treasurer shall be signed by a majority of the commission and shall specify fully the purpose for which it is drawn. If the proceeds of assessment exceed the cost of the park the excess shall be used in its improvement, under the direction of the officers named in section *eight*, if such excess shall not exceed the amount of ten thousand dollars. If it shall exceed that amount that part above ten thousand dollars shall be refunded ratably. Public officers performing any duty hereunder shall be allowed such fees and compensation as they would be entitled to in like cases of collecting taxes. The civilian members of the commission shall be allowed ten dollars per day each for each day of actual service. Deeds made to purchasers at sales for delinquent assessments hereunder shall be prima facie evidence of the right of the purchaser, and any one claiming under him, that the real estate was subject to assessment and directly benefited, and that the assessment was regularly made; that the assessment was not paid; that due advertisement had been made; that the grantee in the deed was the purchaser or assignee of the purchaser, and that the sale was conducted legally.

Any judgment for the sale of any real estate for unpaid assessments shall be conclusive evidence of its regularity and validity in all collateral proceedings except when the assessment was actually paid, and the judgment shall estop all persons from raising any objection thereto, or to any sale or deed based thereon, which existed at the date of its rendition, and could have been presented as a defense to the application for such judgment.

To pay the expenses of inquiry, survey, assessment, cost of lands taken, and all other necessary expenses in-

cidental thereto, the sum of one million two hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated: *Provided*, That one-half of said sum of one million two hundred thousand dollars, or so much thereof as may be expended, shall be re-imbursed to the Treasury of the United States out of the revenues of the District of Columbia in four equal annual installments, with interest at the rate of three per centum per annum upon the deferred payments: *And provided further*, That one-half of the sum which shall be annually appropriated and expended for the maintenance and improvement of said lands as a public park shall be charged against and paid out of the revenues of the District of Columbia, in the manner now provided by law in respect to other appropriations for the District of Columbia, and the other half shall be appropriated out of the Treasury of the United States.

SEC. 7. That the public park authorized and established by this act shall be under the joint control of the Commissioners of the District of Columbia and the Chief of Engineers of the United States Army, whose duty it shall be, as soon as practicable, to lay out and prepare roadways and bridle paths, to be used for driving and for horseback riding, respectively, and footways for pedestrians; and whose duty it shall also be to make and publish such regulations as they deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury or spoliation of all timber, animals, or curiosities within said park, and their retention in their natural condition, as nearly as possible.

Approved, September 27, 1890.

No. 164.

Reply Brf. of Atty. Gen.l (Richa
for Appts.

Filed Dec. 11, 1897.

DEC 11 189
JAMES H. McKENNEY,
CLER

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN M. WILSON AND WILLIAM M. BLACK (successors to William P. Craighill, Charles F. Powell), Henry V. Boynton, Samuel P. Langley, and R. Ross Perry, constituting and composing the commission to select the land for Rock Creek Park, appellants,
v.
AVARILLA LAMBERT AND MARTINA CARR, children and sole heirs-at-law of John Van Riswick, deceased, survivors.

No. 164.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

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No. 164.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

I.

JURISDICTION OF THIS COURT.

Counsel for the appellees, after devoting more than forty pages of his brief to a discussion of the constitutionality of the sixth section of the Rock Creek Park act, suggests, on page 44, that this court may be without juris-

diction to determine that question. He bases his sugg
tion upon the claim that there is no jurisdictional amou
involved, and that the pleadings disclose grounds oth
than the constitutionality of the law upon which t
decrees were based.

In the court below, counsel for all the parties waive
as far as they could, the jurisdictional questions, in ord
that there might be a conclusive determination by th
court of the power of the commission to make the asses
ment. Why does opposing counsel change his attitude
The question of the authority of the commission to asse
for benefits under the sixth section will have to be dete
mined by this court. Why not determine it now?

The reply to this contention is—

First. The decision of the court of appeals was prac
tically based altogether upon the unconstitutionality o
the sixth section. (Rec., pp. 40–55.) The conclusion of a
extended discussion of the constitutionality of the law is
"An assessment that necessarily leads to this conclusion
we are compelled to regard as a violation of the Consti
tution of the United States." (Rec., bottom p. 54.) A
a mere makeweight, the court refers (Rec., bottom p. 54)
to a further reason for holding the law invalid:

> But proceeding one step farther, we find that
> not only is this section violative of the fundamental
> law of the land, but it is likewise so hopelessly
> inconsistent and meaningless that it is impossible to
> determine its sense with any certainty; and conse-
> quently it is impossible to execute it with any pro-
> priety, even if it were not affected with the fatal
> taint of unconstitutionality.

The court does not attempt to construe the section, so there is no question of construction involved, but says:

> It is very evident that this section was passed without much, if any, consideration by Congress. It does not reflect the legislative mind or express the legislative intention, and it is so hopelessly involved in palpable inconsistencies and a maze of meaningless verbiage that *it is impossible to apply to it any of the canons of construction* that a court is authorized to apply in such cases.

This amounts to saying: "This section is vicious in principle and repugnant to the Constitution. It is also so inconsistent and meaningless that it is impossible of execution. For these reasons we will not attempt to enforce it; we declare it null and void; we wipe it off the statute books."

Would the court below have had any difficulty in applying to this act the canons of construction if it had approved of the principle of assessment for benefits and believed the section to be constitutional?

Second. The eighth section of the act of February 9, 1893 (27 Stats., 434), gives this court jurisdiction in error or on appeal in every cause, without regard to the sum involved, "*in which is drawn in question the validity of a treaty or of a statute of or an authority exercised under the United States.*" The validity of a statute means its legal efficacy; its sufficiency in point of law. A statute may be insufficient in point of law and invalid, not only because it violates some provision of the Constitution, but because it is so framed that it is impossible to carry its provisions into force and effect. A statute impossible of execution

is invalid, because it has no force or effect in law. The holding of the court of appeals upon the point that the sixth section of the Rock Creek Park act was impossible of execution, was a finding that it was and is invalid *for that reason*, as well as for the reason that it is repugnant to the Constitution.

I do not admit that the judgment of the court of appeals could be sustained solely upon the second ground stated in its opinion, to wit, that the sixth section is impossible of execution, but if it could be, still there would be drawn in question the validity of this statute of the United States.

Consider the result if this court should refuse to review the decision of an inferior court holding a United States statute invalid because impossible of execution. The court of appeals of the District of Columbia has no power now to nullify a law of the United States on the ground that it is invalid. That authority is reserved to this high tribunal. Neither can a State court abrogate a United States statute by holding it invalid. The question whether a Federal law is or is not invalid can always be carried as a last resort to this court.

But suppose we limit the meaning of invalidity to unconstitutionality, and say that while an inferior court can not pass finally upon the question of unconstitutionality, can not conclusively determine that a Federal law is null and void because repugnant to the Constitution, nevertheless it may declare a law invalid, and thus wipe it off the statute books, by holding that its terms are inconsistent and meaningless, and its provisions impossible of execution. The result is the same—the Federal

w is nullified, and there is no recourse. Would it take ferior courts long to understand *how* to give finality to eir decisions holding Federal statutes invalid? It is t hard to conclude that an unconstitutional law is im- ssible of execution, and a court might honestly couple th its finding that an act is unconstitutional, the con- usion that its language is inconsistent and meaningless, d its provisions impossible of execution. Thus this urt would be effectually ousted of the power of pro- cting the Constitution and enforcing those valid laws ssed by Congress in the execution of its provisions. In this connection, the language of this court, speak- g by Mr. Justice Gray, in *Bauman* v. *Ross* (bottom p. 3), is instructive:

> The power of Congress, exercising the right of eminent domain within the District of Columbia, to provide for the deduction of benefits from the compensation or damages for taking part of a parcel of land and injuring the rest, *does not appear ever to have been judicially questioned until it was denied by a majority of the court of appeals of the District of Columbia within the last two or three years.* *District of Columbia* v. *Prospect Hill Cemetery*, 5 App. D. C., 497; *Maryland and Washington Railway* v. *Hiller*, 8 App. D. C., 289; *District of Columbia* v. *Armes*, 8 App. D. C., 393.
>
> *The position thus assumed by the majority of that court is not only against the uniform course of previous legislation and decision in the District of Columbia, but it is opposed to the great preponderance of the authorities elsewhere.*

hird. The question involved in this case is the author- of the Rock Creek Park Commission to levy an

assessment for benefits. The authority granted the commission is one conferred by act of Congress. It is an authority "exercised under the United States." There is therefore drawn in question in this case the validity of an authority exercised under the United States, and upon this ground this court has jurisdiction.

II.

THE COMMISSION WAS NOT FUNCTUS OFFICIO; IT PROCEEDED TO ASSESS AS SOON AS IT COULD.

In the brief of the appellees it is urged that when the commission set about making the assessment, "not only had the time elapsed for making a valid assessment, but the commission, by surrendering their functions, had disqualified themselves from making it. In other words, they were *functi officiis*."

This is an objection that the commission did not proceed to assess at the proper time. When was it ever held that time is of the essence of an assessment, the benefit of which is to inure to the public? Suppose a board authorized to make an assessment should violate the law and make a bad assessment, would the board thereby become *functus officio*? Certainly not; if it took five years to determine the assessment had the board at the end of that time could make a proper assessment. If the law had mentioned the time when the assessment should be made, the language, in the absence of express provision to the contrary, would be treated as simply directory and not mandatory. The assessment is not made for the benefit of the commission. It is made for

the benefit of the public, in this case the United States and the District of Columbia, and the commission, by no delay, whether intentional or unintentional, could relieve the benefited property holders from paying into the United States Treasury the amount they had received by the enhancement of the value of their real estate through the establishment of the park.

But in point of fact there was no improper delay on the part of the commission. It set about making the assessment just as soon as it was possible to do so, in view of the provisions of the law and the duties devolving upon the commission under it, as the matter of the location and establishment of the park from day to day developed.

The act contemplates that the lands selected, purchased, and condemned for the park shall be paid for, in the first instance, out of the appropriation made by Congress, for it provides:

First, near the end of the first section, that the total cost of the park shall not "exceed the amount of money herein appropriated."

Second, in the third section, that the commission shall endeavor to purchase the land selected for the park, by agreement, and shall pay for the same a just compensation, to be determined by the commission and approved by the President.

Third, near the close of the third section, that after the value of the lands condemned had been ascertained in the proceeding in court, and the President had decided the same to be reasonable, the ascertained compensation

shall be paid to the owner or owners, or deposited in court to their credit, whereupon the fee simple shall be vested in the United States.

All these things had to be done before the land in the park could be definitively selected and condemned, and the title vested in the United States and the park established, so that an assessment became possible.

The commission was obliged: (1) To select the land and make and file a map of the proposed park. (2) To endeavor in good faith to purchase the land by agreement before instituting condemnation proceedings. Of necessity the commission had to pay for land purchased by agreement, and in fact did buy and pay for several tracts in this way out of the appropriation. (3) To proceed to condemn lands which it was unable to purchase by agreement.

Long condemnation proceedings ensued. The appraisements made in court, taken in connection with the cost of land purchased, having exceeded the appropriation, certain tracts on the original map were abandoned, in order that the park might be brought within the cost limit. Of this modification of the map the President approved. With some exceptions, the owners of the tracts remaining within the park limits accepted, and were paid the appraised value of their land. This money, of course, was paid out of the appropriation; there was no other fund available.

The owners of several of the tracts included upon the revised map appealed to the Supreme Court (*Shoemaker* v. *United States*, 147 U. S., 282), and up to the deter-

mination of that appeal no one could say what the ultimate contents of the park as established would be. If this court had reversed the Shoemaker Case, the United States might have abandoned those tracts or a new jury put their value at prohibitory prices.

It thus appears that the park could not be definitively established until every tract within its limits had been ascertained and paid for, and its title acquired; and certainly no court would say that the owners of tracts who at the outset agreed to sell to the United States, and owners of tracts who later accepted the appraised value of their lands, ought to be or could be compelled to await payment until a litigious owner of a tract sought to be condemned should have availed himself of the delay incident to running the gauntlet of all the courts.

In the next place, no benefits could properly be assessed until the park had become finally established. A tract abutting on and overlooking the park would receive more benefits than one not abutting on the park. The original map showed lands abutting whose location with reference to the park was changed by the abandonment of certain tracts and the making of the revised map. If that part of the park upon which a man's tract actually abutted was abandoned by the Government, so that his property no longer fronted on the park, his benefits would be greatly reduced.

Again, take the case of tracts shown within the limits of the park in the original map. If abandoned *pendente lite*, they would be assessable for benefits. If not abandoned, they would not only be nonassessable, but would

have to be paid for. The situation being a shifting one, no assessment for benefits could be properly made until the limits of the park should be finally and irrevocably established. The lands to be assessed could not be determined until that time; neither could the benefits received by the several tracts.

After the decision of the Shoemaker Case, it was ascertained that the appropriation had not been exhausted, so the commission, with the approval of the Attorney-General and the President, extended the limits of the park as shown on the revised map by purchasing more land from the tracts included in the original map and abandoned in the revised one. The view taken by the commission, under the advice of the Attorney-General, was that the various processes, the purchases and condemnations, the making and revising of the map, were tentative, and that the park was not finally and conclusively established until the title to the land within it had been acquired and it turned over to the permanent commission. Until the Shoemaker Case was decided, it was not possible to tell how much the Shoemaker tracts would cost. After that decision these facts became known, and the commission then found that money remained available for the purchase of more land. The Attorney-General thereupon advised the President to approve these further purchases, and the President did so, thus extending the limits of the park as shown on the revised map. Then for the first time were the cost of the land and the expenses "ascertained," and the commission in a situation to proceed with the assessment.

The opinions of the Attorney-General upon the Rock Creek Park act are to be found in Opinions, vol. 20, pp. 67, 129, 326, 377.

JOHN K. RICHARDS,
Solicitor-General.